

**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

MARVIN E. ALBRO

§

VS.

§

CIVIL ACTION NO. 9:18-CV-45

UNITED STATES OF AMERICA

§

**ORDER PARTIALLY ACCEPTING THE MAGISTRATE  
JUDGE'S REPORT AND RECOMMENDATION**

Movant Marvin E. Albro, a federal prisoner, proceeding *pro se*, filed this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

The court ordered that this matter be referred to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends dismissing the motion without prejudice.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and the pleadings. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties. The movant filed a document entitled "Termination of Pending Civil Motion," in which he requests dismissal of the § 2255 motion. After due consideration, the court is of the opinion that the movant's motion to dismiss this action voluntarily should be granted.

In this case, the movant is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting

a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. If the motion was denied on procedural grounds, the movant must show that jurists of reason would find it debatable: (1) whether the motion raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

Here, the movant has not shown that any of the issues raised by his claims are subject to debate among jurists of reason, or that a procedural ruling is incorrect. In addition, the questions presented are not worthy of encouragement to proceed further. The movant has failed to make a sufficient showing to merit the issuance of a certification of appealability.

#### ORDER

Movant's motion to dismiss (document no. 9) is **GRANTED**. The Report and Recommendation of the Magistrate Judge (document no. 7) is **ACCEPTED** to the extent that it

recommends dismissal of this § 2255 motion without prejudice. A final judgment will be entered in this case in accordance with this order. A certificate of appealability will not be issued.

So ORDERED and SIGNED, Jan 13, 2021.

A handwritten signature in black ink, appearing to read "Ron Clark", written over a horizontal line.

Ron Clark  
Senior Judge